No. 20526

United States
COURT OF APPEALS
for the Ninth Circuit

SCHNITZER STEEL PRODUCTS CO.,
a corporation,
Appellant,

v.

AMTRO CORPORATION, S.A., a Panamanian corporation, and CIA. ESTRELLA BLANCA, LTDA., as Owner of the SS NICTRIC,
Appellees.

AMTRO CORPORATION, S.A., a Panamanian corporation,
Cross-Appellant,

v.

SCHNITZER STEEL PRODUCTS CO., a corporation, and CIA. ESTRELLA BLANCA, LTDA., as Owner of the SS NICTRIC,
Cross-Appellees.

REPLY BRIEF OF APPELLANT SCHNITZER STEEL PRODUCTS CO.

Upon Appeal from the United States District Court for the District of Oregon
HONORABLE JOHN F. KILKENNY, Judge

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-66

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I

The conditional liability of Schnitzer under Clause 8 of the voyage charter party for unloading demurrage and unpaid freight was not changed to primary liability by other clauses of the charter party.

Schnitzer has set forth in its opening brief, pp. 34-50, its position that Clause 8 of the voyage charter party

(Ex. 2) allocates liability for demurrage incurred at the discharge port and for unpaid freight, and that Schnitzer as voyage charterer was liable under Clause 8 for those items only "to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on cargo." Appellees in their answering briefs raise a number of arguments in support of the trial court's view that Clauses 7 and 18 of the charter party make Schnitzer as voyage charterer primarily liable for these sums by impliedly eliminating the condition on Schnitzer's liability set forth in Clause 8. Most of these arguments are answered by Schnitzer's opening brief, and we shall reply to only a few of them here.

Appellees argue that the term "merchants" as used in the original printed charter party form meant cargo receivers, and that deletion of that term in Clause 7 suggests that charterers were to become primarily liable for demurrage at the discharge port. It is true that Clause 8 of the charter party contemplates that cargo receivers will be primarily responsible for demurrage incurred at the discharge port, and that the charterer is only secondarily liable to the extent that the lien on cargo given by Clause 8 cannot be exercised. Clause 8, however, does not refer to "merchants" in allocating this liability. Liability is imposed on cargo receivers by the charter party giving the vessel a lien on cargo, in contemplation that the charterer will bind the cargo receivers to this liability by issuance of bills of lading incorporating the charter party, including the cesser clause. When receivers accept delivery of cargo under bills of lading so phrased, they agree to their responsibility for unloading demurrage and

unpaid freight as imposed upon them by Clause 8. See *Yone Suzuki* v. *Central Argentine Railway,* 27 F.2d 795, 800, 805 (CCA 2 1928), cert. den. 278 U.S. 652; *The Lake Galera,* 60 F.2d 870, 879 (CCA 2, 1932), and other authorities discussed at pp. 37-38 and 48-49 of Schnitzer's opening brief.

The deletion of the term "merchants" from the original printed language of Clauses 6 and 7 of the charter party does not suggest any intention to change the liability allocation of Clause 8. "Merchants" as used in the original printed form is a general term, encompassing both shippers and receivers of the cargo. Original Clause 6 referred to merchants receiving and discharging the cargo. Original Clause 7, however, allowed "merchants" ten running days on demurrage *at ports of loading and discharge.* Since Clause 8 and original Clause 5 placed responsibility for loading and demurrage at the *loading* port on charterers, "merchants" in original Clause 7 obviously referred both to charterer-shippers and receivers of the cargo. When the charter party wished to refer specifically to cargo receivers or to shippers, as opposed to both, it used those precise terms. See, *e.g.,* references to "receivers" in original Clause 4, Clause 42 and the Strike Clause, and references to "shippers" in Clause 5 and the War Clause.

Clause 18 modified the laydays and calculation of demurrage which was specified in the original printed language of Clauses 5, 6 and 7. These clauses in the original charter party called for a specified number of laydays for loading, a specified number for discharge,

and ten days on demurrage at a specified rate, and said nothing about demurrage in the event that delay exceeded those ten days. By deleting portions of these clauses, and adding Clause 18, the parties created a different method of calculating laydays: a total of 23 weather working laydays were given both for loading and discharge, and a rate was agreed upon for demurrage after the laydays expired. In this scheme, deletion of original Clause 6 and a part of original Clause 7, including the term "merchants," was necessary. Thus, the elimination of references to "merchants" in the original printed language of those clauses had nothing whatever to do with changing the allocation of liability for demurrage specified in Clause 8.

If the parties had intended to remove the condition on Schnitzer's liability for unloading demurrage set forth in Clause 8, they would have deleted the final clause of Clause 8, leaving the last sentence reading:

> "Charterers shall also remain responsible for freight, and demurrage incurred at port of discharge. [but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.]"

There are deletions from the original language of Clause 8 in three places, but the condition on Schnitzer's liability for unloading demurrage, bracketed in the above quotation, is not deleted. The plain inference is that all of original Clause 8 not deleted including the condition on Schnitzer's liability, was intended to remain effective.

Contrary to Owners' brief (page 9), *The Luossa,* 1936 AMC 213 (Arb. 1935), involved a claim that an added Clause 18 modified Clause 8 of the original printed Gencon form. Clause 8 in that case was identical to Clause 8 here. The vessel owners argued in *The Luossa* that Clause 18 of that charter party modified the demurrage liability allocation of Clause 8, and thus eliminated the requirement that owners show inability to exercise the lien as a condition of recovering demurrage incurred at the discharge port. Clause 18 in *The Luossa* charter party provided:

> "18. In case of demurrage or other claims, owners agree to a Bank guarantee on a first-class bank, until the claim is definitely settled later on between owners and charterers by arbitration in New York."

The arbitrators held that Clause 8, not having been stricken out of the charter party, was to be given effect, and that the reference to possible demurrage liability of the charterer in Clause 18 referred to the limited demurrage liability set forth in Clause 8 of the Gencon form:

> "In an effort to avoid dismissal of owner's claims upon technical grounds, we have also given full consideration to the relation of Clauses 8 and 18. While it might have been the function of the typewritten clause (18) to supersede the printed clause (8) we have concluded that unless the parties had intended both to be given effect, they would have stricken out Clause 8. As the clauses stand, obviously they both must be given effect if it is possible to do so. In the absence of any proof to the contrary, we are, therefore, forced to the result that Clause 18, insofar as it concerns demurrage, can only refer to demurrage

> at loading port or to such demurrage at discharging port as owner is unable to collect by the enforcement of its lien." (1936 AMC at 216-217)

The Luossa is also in point as rebuttal to Appellees' contention here that the requirement of payment of demurrage in United States currency indicates some intention that Schnitzer, as opposed to the Japanese consignees, was to be primarily liable for unloading demurrage. The charter party in *The Luossa* required payment of unloading demurrage in U. S. currency, but it was not even suggested there that this had any bearing on demurrage liability, which it plainly does not. Japanese firms engage in substantial trade with the United States, and receive payment for exports to the United States in our currency, which makes U. S. dollars available in Japan or in this country for payment of Japanese obligations requiring that currency. International banking departments, including those in Japan, are geared to make arrangements on behalf of their customers for paying and receiving in currencies of many countries amounts owed to or by Japanese importers and exporters.

Nor is the fact that the balance of freight was payable upon completion of discharge inconsistent with the condition of Clause 8 on Schnitzer's liability. If Amtro felt that the small amount of remaining freight might not be paid on completion of discharge, it could simply have demanded security for payment and have refused to complete discharge until security was given by the consignees or the funds put in escrow pending completion of delivery.

In support of their contention that Schnitzer was the author of the voyage charter party and chargeable with an ambiguity in its terminology, appellees urge that Seacharter Company, the charter broker, acted as agent for Schnitzer in its discussions with Amtro and its agents as to the terms of the charter party. As evidence, they point to testimony of Kimberk that Captain Jensen of Seacharter Company told him that Seacharter was an agent of Schnitzer. Kimberk, however, also testified that he had never confirmed this with Schnitzer, the alleged principal, and that he had never seen a written authorization for the alleged agency (Ex. 79, p. 9). It is familiar law that an alleged agent's statement that he is an agent is not sufficient to prove his agency for the alleged principal. RESTATEMENT OF AGENCY 2D Section 285.

It is immaterial, in any event, whether or not Seacharter acted as agent of Schnitzer, rather than as an independent charter broker. The role of Schnitzer and its alleged agent in drafting the charter party was simply to submit as a sample for discussion the charter party of the KEHREA, after which the parties agreed upon appropriate modifications for the NICTRIC and the particular voyage contemplated. See discussion of the evidence in Schnitzer's opening brief, p. 42. There was no evidence as to who had drawn the similar provisions on demurrage in the KEHREA charter party, nor of any discussion between the parties to the NICTRIC charter party as to the allocation of liability for demurrage. Mr. Bettinger of Seacharter Company testified as follows (Tr. 155-160):

"Q. Are you familiar with the Gencon form of charter party?

A. Yes.

Q. Was anything said during the negotiations of the NICTRIC concerning a cesser clause? Did Amtro ever tell you that they wanted the cesser clause eliminated from this charter party?

A. No.

Q. When the charter was fixed, was your understanding that the cesser clause was a part of this charter party?

A. Yes sir.

Q. Nobody ever said anything to the contrary to you?

MR. PARKS: Your Honor, the charter speaks for itself. It has got a cesser clause in it.

THE COURT: Of course, wherever it speaks for itself that is going to control.

BY MR. LEWIS:

Q. Did any party ask you to eliminate the provisions of the cesser clause.

A. No.

Q. Did Amtro ever raise this question at all about the cesser clause, that they didn't like it?

A. No.

Q. Have you negotiated charters where the cesser clause was eliminated?

A. I have never negotiated such charters, no."

As Mr. Bettinger's testimony indicated, the cesser clause is a common part of the charter party on scrap shipments. To the same effect is the testimony of Mr. Leonard Schnitzer that in 200 charter parties involving Schnitzer, the cesser clause had been in all of them, except in one case where the parties specifically agreed

that it should be deleted (Tr. 198). In view of the lack of discussion among the parties as to any modification of the usual cesser clause or of its allocation of liability for demurrage and unpaid freight, it may be inferred that the usual operation and effect of the clause was intended, in the absence of any evidence to the contrary.

Concerning the "uncontradicted" testimony of Mr. Fletcher (Tr. 107) that Mr. Krause, Schnitzer's counsel, on November 17, 1961, asserted that Amtro had no lien on the cargo, we invite the Court's attention to Dep. Ex. F19, a report letter dated November 27, 1961, from Amtro's Mr. Stewart to its agent, Mr. Morgan. In this letter, Mr. Stewart wrote:

> "Re: NICTRIC demurrage.
>
> I have had one hell of a time with the Schnitzer crowd regarding the demurrage. As of this date they have not paid anything towards the demurrage charges. I asked our attorney to help resolve this situation. He has placed them on notice, that if the demurrage charges were not paid up to date, we would exercise a lien on the cargo. *Schnitzer has taken the position, that for us to go ahead and lien the cargo.*" (Emphasis supplied)

This is hardly consistent with Mr. Fletcher's testimony. Mr. Krause could not have taken the witness stand to contradict Mr. Fletcher without depriving Schnitzer of counsel for the balance of the trial. Schnitzer's other attorney at the trial, Mr. Lewis, was called as a witness (Tr. 220). Schnitzer's counsel had no reason to anticipate that Mr. Fletcher would take the stand and testify as to statements allegedly made by Mr. Krause. Mr.

Fletcher's taking the stand did not deprive Amtro of counsel, since Mr. Parks was on hand as Amtro's associate counsel and took over examination of witnesses after Mr. Fletcher testified (Tr. 132).

Much is made in Amtro's answering brief of Schnitzer's alleged "misreading" of the Court's opinion as to the construction of the charter party. The Court did not hold, Amtro says, that Clause 18 modified Clause 8 to the extent of eliminating the lien on cargo for unloading demurrage and unpaid freight; Clause 8 was modified only to the extent of eliminating the condition on Schnitzer's liability of the vessel's inability to exercise the lien on cargo. The Court's opinion can be read as holding that Clause 8, including the lien on cargo, was superseded by Clause 18.[1] If, however, the opinion is read as holding only that the condition on Schnitzer's liability set forth in Clause 8 (inability to exercise the lien on cargo) was eliminated by Clause 18, our point is the same: all parties assumed until after this case was filed and after cargo discharge was completed that Clause 8 was fully in effect and that inability of Amtro

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[1] See R. 144, lines 21-24:

"*Even if Clause* 8 *remained in full force and effect,* not modified by the typewritten language, the provision with reference to the exercise of the lien being the sole remedy, it should not be enforced on the record before me." (Emphasis supplied)

And see R. 141, lines 5-9 and 20-22:

"Subsequently, *Schnitzer's counsel took the position that in fact there was no lien on the cargo for the demurrage. Schnitzer relied on this construction of the contract* from about November 17th until after the cargo had been discharged on December 31st. . . . Until December 7th, it is quite clear that *Schnitzer interpreted the contract in line with Amtro's and this Court's conclusions.*" (emphasis supplied)

to exercise the lien was a condition to Schnitzer's liability for demurrage incurred at the discharge port. See pleadings and evidence cited at pp. 43-46 of Schnitzer's opening brief. See also Dep. Ex. B-2, a cable from owners to Dodwell on December 28, 1961, advising the latter of the filing of this suit and instructing them nevertheless to "endeavour exercise lien view keeping voyage charterers responsible under Clause 8 voyage charter."

Thus, there is no reason to believe that the parties to the voyage charter intended to modify the usual operation of the cesser clause as set forth in Clause 8 of the charter party. Its operation was to impose upon the consignees liability for demurrage incurred at the port of discharge and for unpaid freight, when cargo was accepted by them under bills of lading incorporating the terms of the voyage charter party. See discussion and cases cited at pp. 36-38, 48-49 of Schnitzer's opening brief. Schnitzer as voyage charterer remained liable to Amtro for these amounts, as Clause 8 provides, only to the extent that Amtro was unable to collect the demurrage and unpaid freight from the consignees by exercise of its lien on the cargo.

II

Appellees failed to prove that Amtro was unable to collect the demurrage and unpaid fright from the consignees by exercise of the lien on cargo, and thus failed to meet the condition stated in Clause 8 of the charter party on Schnitzer's liability.

Here again, Schnitzer's opening brief, pp. 51 et seq., rebuts most of the points argued in Owners' answering

brief (pp. 24-37), and we shall confine our reply to comment on a few of the answering arguments.

Owner's brief, like the District Court's opinion, attempts to shift to Schnitzer the burden of establishing that the lien on cargo could have been exercised. The burden, however, is upon appellees under Clause 8 of the voyage charter party to prove the condition upon Schnitzer's liability, that Amtro was unable to exercise the lien. *The Luossa,* 1936 AMC 213 (1935); *The Arizpa,* 63 F.2d 42, 43 (CCA 4, 1933); Tiberg, THE CLAIM FOR DEMURRAGE (1962), p. 55. Schnitzer has cited in its opening brief (pp. 53-68) the inadequate and *pro forma* efforts to exercise the lien, and the absence of anything other than hearsay, speculation and conclusion lacking factual support for findings that Amtro was unable to do so.

Owners claim (Br. p. 27) that the lien could only be exercised by the vessel retaining possession of the cargo either on board the NICTRIC or in lighters or ashore. That is neither the Japanese nor the American law. As the court found (R. 144), Japanese law gives a lien for demurrage on the cargo after delivery to the consignees if asserted by judicial proceedings within two weeks after delivery (Ex. 44J, pp. 231 et seq.; Dep. Ex. L-4; Ex. 44I, pp. 193, 224). Mr. Main of Dodwell & Co. testified that he had exercised liens on cargo after discharge in Japan (Ex. 44G, p. 173). American law is similar. The vessel may exercise its lien for unpaid freight and demurrage by a suit in rem against the cargo after delivery to the receivers, if delivery was made with notice

to the receivers of the vessel's claims against the cargo. *Bags of Linseed,* 1 Black 108, 17 L. Ed. 35 (1861).

Owners assert (Br. pp. 32-35) that the evidence showed delivery of the cargo directly to third parties other than the consignees, so that exercise of the Japanese lien after discharge was impossible. Owners first cite generally the testimony of Yoshida, Kayashima and Hayashibara, representatives of three of the consignees, without reference to any particular pages of their depositions. Neither Yoshida nor Kayashima was able to say when the two consignees they represented sold or delivered their cargo to third parties, or even whether it was before or after discharge from the vessel (Ex. 44B, pp. 6-7; Ex. 44C, pp. 11-12). Moreover, the District Court sustained motions to strike their testimony as hearsay (R. 124, 184-185). Hayashibara was far from certain as to when the cargo of his consignee was delivered to a third party, and failed to produce any sale or delivery documents (Ex. 44D, pp. 27-32).

The main reliance of Owners' brief, like that of the District Court (R. 142-143, 144), is on the cargo discharge survey reports (Exs. 22-27, 29). These reports show on their face that their purpose was to determine the amount and condition of the cargo. They do not purport to be records of delivery or sale by the consignees to third parties. Schnitzer objected to their admission into evidence on this ground (Tr. 10-12). The reports do not state that delivery of the cargo was to the named consumers or that the consumers, rather than the consignees, were in possession of the cargo. In some instances, the inspection evidenced by the report occurred several days

after the cargo had been discharged, with no information as to when, if ever, possession passed from consignee to consumer (*e.g.*, Ex. 24A, showing inspection on January 6 and 9, 1962, a week after discharge of the NICTRIC was completed on December 31, 1961). It was error to admit these reports to show transfer of possession of the cargo to third parties (Tr. 10-12), and more harmful error to rely on them as establishing such transfer (R. 142-143, 144). Appellees failed to produce the negotiated bills of lading or any evidence to show whether the consignees or third parties presented the bills of lading to the master of the NICTRIC in order to receive the cargo. The vessel's master in his deposition (Ex. 47) offered no enlightenment as to the identity of the parties whom he permitted to discharge and receive the cargo from the vessel.

Owners refer to Schnitzer's objections to hearsay, speculation and conclusion without factual support, and to the District Court's reliance on it, as "technical niceties." This is not a case in which only a few incidental and harmless items of inadmissible evidence were received by the court. Nor is it a case where prejudicial matter has been erroneously admitted in evidence, but disregarded by the court in reaching its decision. The record in this case is filled with an incredible amount of hearsay, surmise, speculation and unfounded conclusion, as a reading of the testimony quoted in the Specifications of Error (Schnitzer's opening brief, pp. 14-33) or of any of the depositions admitted in evidence will show. Another example is Captain Cassimatis' testimony quoted at p. 25 of owners' brief. Moreover, the District

Court necessarily relied on much of this evidence in its findings, as is shown in Schnitzer's opening brief, pp. 61-69. The Court's findings of inability to exercise the lien rest heavily on the deposition of Dodwell's employees, Main and Saishoji. Yet both admitted that their testimony was mainly hearsay and not based on personal knowledge. See evidence cited and quoted in Schnitzer's opening brief, pp. 61-62.

Schnitzer has attempted on this appeal to restrict its specifications of error challenging the evidence and findings to those matters of inadmissable and insufficient evidence on which the Court's opinion indicates reliance. Compare the vast amount of hearsay, speculation and conclusions cited in Schnitzer's objections in the District Court to the deposition evidence (R. 123-128) with Specifications of Error Nos. 12 through 17 set forth at pp. 15-32 of Schnitzer's opening brief. To object to findings and a decree based throughout on inadmissible and unreliable hearsay and speculation is not to indulge in "technical niceties," but to assert fundamental unfairness in the trial and in the decision-making process.

As Benedict on Admiralty (6th ed. 1940) Section 381(b) points out in a passage immediately following the language quoted at p. 28 of Owners' brief, the rationale of relaxing admissibility rules in trials to a court without a jury is that the court will appreciate the absence of probative value in hearsay, speculation and the like, and will treat it accordingly in reaching its decision:

"The experienced judge may be relied upon to

> appreciate the probative value of any material offered in evidence; and if he should err, the appellate court may correct the error, as an admiralty appeal is a trial *de novo*.
>
> "The freedom in admitting evidence is largely due to the fact that admiralty cases are tried by judges, and not by juries."

While the rules of initial admissibility may be relaxed on this rationale, neither Benedict nor the cases cited in Owners' brief, page 28, hold that the District Court sitting in admiralty may not only receive but also base findings solely on inadmissible hearsay, speculation and surmise in the testimony of witnesses.

Owners claim (Br. pp. 28-29) that Main and Saishoji of Dodwell & Co. testified that exercise of the lien was impossible. The citations given to their deposition testimony do not support the assertion, and Schnitzer's opening brief, pp. 54, 60-62, shows that their testimony was hearsay and conclusion lacking personal knowledge. With even less foundation in the record, Owners also assert (Br. pp. 29, 37) that their legal counsel in Japan had given contemporaneous advice that exercise of the lien on cargo in Japan was impossible. Owners cite the hearsay testimony of the NICTRIC's master (Ex. 47, pp. 51, 59-60), which is quoted and attacked in Schnitzer's Specification of Error No. 17. Cassimatis' statements of what he was told are contradicted by Main's testimony that Owners' Japanese counsel (the McIvor firm) never advised Dodwell that exercise of the lien was impossible, legally or otherwise (Ex. 44G, p. 177-2). The letter of McIvor to Dodwell of December 13, 1961 (Dep. Ex.

B-18), shows that the facts bearing on the legal right to lien the cargo were not made available to the law firm, and that McIvor suggested only that it might be easier to sue Schnitzer than to proceed with exercise of the lien. Owners failed to call any member of the McIvor firm to testify directly as to what advice on lien exercise, if any, was given by them.

As part of their effort to shift to Schnitzer the burden of proof on the condition of inability to exercise the lien, Owners belabor Schnitzer for failing to arrange for discharge of the cargo and exercise of the lien, and imply that PacMarine as agent for Schnitzer had the power to direct and arrange for these matters. In fact, the right to control discharge and to arrange for it was solely in the consignees of the cargo, and was not within the control of Schnitzer. See sale contracts discussed in Schnitzer's opening brief, pp. 47-48, and testimony of Leonard Schnitzer, Tr. 189. Moreover, in view of the clear desire of appellees to bring suit against Schnitzer and to attempt exercise of the lien only to the extent of gathering "proof" that exercise was impossible, any suggestion by Schnitzer's agents would have been ignored by appellees.

Finally, Owners' claims that appellees were deterred from exercise of the lien by statements of Schnitzer that it would pay the demurrage are without foundation. Mr. Fletcher testified that he was told by Mr. Krause on December 7, 1961, that Schnitzer would not pay the demurrage and that he immediately thereafter instructed exercise of the lien:

> "THE WITNESS: I heard nothing further from Mr. Krause following the 5th until the 7th, on

which day I called Mr. Krause and asked him where the agreement and money were. Mr. Krause told me that his clients were not—that he was informed that his clients were not going to go through with the agreement; that we had better take whatever remedies we thought we had.

Q. Did you communicate this fact to owners?

A. I communicated this fact to owners, telling them to go ahead; that that was the situation, and that they had better now go ahead and start the exercise of the lien." (Tr. 113-114)

We have demonstrated in our opening brief (pp. 60, 74-75) that Amtro and Owners in November, 1961, had commenced preparations to exercise the lien, notwithstanding settlement negotiations with Schnitzer, and that more than enough cargo remained on board the NICTRIC to exercise the lien after December 7 and until shortly before discharge was completed on December 31. Appellees chose, instead, to proceed by filing this suit against Schnitzer on December 14, and to make thereafter only token efforts to exercise the lien, with a view toward keeping Schnitzer "responsible" under Clause 8 of the charter party (see Dep. Ex. B-2).

In summary, appellees failed in their burden of showing inability to exercise the lien. The Court's findings to the contrary rest on hearsay, speculation and unfounded conclusion having no probative value. Accordingly, the condition upon Schnitzer's secondary liability under Clause 8 of the voyage charter party for unloading demurrage and unpaid freight was not met. The District Court's decision deprived Schnitzer of the benefits of

the cesser clause, by permitting appellees to ignore their obligation to collect these amounts from the consignees as the parties primarily liable. Schnitzer is without the benefits of possession or lien rights on the cargo to compel payment by the consignees.

CONCLUSION

The decree of the District Court should be set aside to the extent that it awards demurrage and unpaid freight against Schnitzer Steel Products Co.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

CARL R. NEIL

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